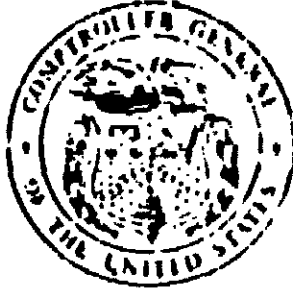


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DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

FILE: B-204483

DATE: April 5, 1982

MATTER OF: Frequency Electronics, Inc.

DIGEST:

1. GAO will not question contracting agency's sole-source award where agency has shown that time was of the essence and only one known source could meet its needs within the time-frame required.
2. Contracting agency should ensure that protester and other potential suppliers are given opportunity to have their equipment fully tested and have opportunity to participate in competitive procurement which agency proposes to schedule.

Frequency Electronics, Inc. (FEI), protests the award of a contract to Hewlett-Packard Company (HPC) on a sole-source basis under request for proposals (RFP) No. N00039-81-R-0587, issued by the Naval Electronics Systems Command (Navy).

The RFP solicited 37 "Cesium Beam Frequency Standards" (CBFS) with an option for two additional units. According to the Navy, the CBFS is used as the "primary time and frequency reference for the VERDIN Digital Data Communication System--a Very Low Frequency/Low Frequency shore-to-ship and air-to-ship communications system that supports the secure command and control requirements of the submarine forces and support elements." FEI argues that the Navy had no basis to procure these items on a sole-source basis since FEI is also allegedly capable of supplying equipment that will meet the Navy's minimum needs. FEI wants the Navy to conduct a competitive procurement for these items.

We find that, under the circumstances, the Navy was justified in awarding a sole-source contract to HPC, but we recommend that the Navy take the steps it has

outlined in its report on the protest to ensure that future procurements are conducted on a competitive basis.

HPC is the original developer and the only Navy-approved producer of the CBFS model which the Navy requires. HPC's equipment was chosen after a technical competition and has been used by the Navy since 1974. According to the Navy, HPC's equipment has passed the required "shock, vibration, environmental, reliability, and maintainability tests," was subjected to follow-on testing in July 1979, and meets the requirements of the applicable military specification--MIL-F-28811(EC)--determined by the Navy to reflect its minimum needs.

FEI argues that its CBFS will meet the Navy's needs and pass all necessary tests. According to FEI, in January 1981, it offered to submit its CBFS to the Navy for testing, but the Navy turned down FEI's request. FEI points out that it has supplied a similar CBFS to the Air Force and that prior to the product's acceptance, this CBFS was fully tested by the Air Force. FEI further states that it is willing to provide the Navy with an additional number of units in order to expedite the Navy's testing process. FEI also notes that HPC has informed the Navy that it will soon stop producing CBFS's. In FEI's opinion, all these factors taken together indicate that the Navy had no reasonable basis for the sole-source award.

Prior to the submission of its protest report to our Office, the Navy awarded a contract to HPC on the grounds that, due to the urgency of the requirement, the best interests of the Government would not be served by delaying the award until the protest was resolved. Thus, an award to HPC was made on September 30, 1981.

As to the merits of FEI's protest, the Navy maintains that the sole-source award to HPC was justified since FEI has failed to show that this decision was unreasonable. According to the Navy, there was inadequate time to conduct necessary tests on FEI's equipment, despite FEI's offer to provide an additional

number of units in order to speed up the testing process. The Navy further notes that the model (FE-5440A) FEI has furnished the Air Force differs from the model (FE-5440A, option "F") that it intends to furnish the Navy. Moreover, the Navy points out that the tests which the Air Force conducted on FEI's equipment also differ from the tests required by the Navy. For example, the Navy requires a "fixed-length reliability test" that totals 9,750 hours, while under the Air Force's First Article Testing the test is a "Mean-Time-Between-Failures" Test which only requires testing for 500 hours.

The Navy acknowledges that HPC intends to stop producing CBFS's in the near future. Because of this development, the Navy states that it has formulated a competitive procurement schedule which it plans to implement during the current fiscal year for approximately 60 to 80 CBFS's representing the needs of future years. According to the Navy, there will be sufficient time under this proposed procurement for all required testing.

We have held that, because of the requirement for maximum practical competition in the conduct of Government procurements, agency decisions to procure from a sole source must be adequately justified and are subject to close scrutiny. Such decisions, however, will be upheld if there is a reasonable or rational basis for them. EMI Medical, Inc.; Picker Corporation, B-195487, February 6, 1980, 80-1 CPD 96.

We have also held that the determination of the needs of the Government and the best methods of accommodating those needs are primarily the responsibility of the procuring agencies. More specifically, we have recognized that the Government procurement officials, who are familiar with the conditions under which supplies, equipment, or services have been used in the past and how they are to be used in the future, are generally in the best position to know the Government's actual needs. Consequently, we will not question an agency's determination of its actual minimum needs unless there is a clear showing that the determination has no reasonable basis. Fenwal, Inc., B-202283, December 15, 1981, 81-2 CPD 469.

With respect to the need for a contractor to have its product qualified before that product can be considered for an award, we have recognized that the responsibility for the establishment of tests and procedures necessary to determine product acceptability is within the expertise of the contracting activity. Tyco, B-199632, March 24, 1981, 81-1 CPD 220. However, an agency may not arbitrarily refuse to test a firm's product, but must take reasonable steps to determine if a proposed alternate will satisfy its minimum needs. See, e.g., Castoleum Corporation, B-195721, November 29, 1979, 79-2 CPD 381.

As indicated above, the Navy based its decision to make a sole-source award on the urgency of the requirement and the fact that, since its equipment was fully tested, only HPC could meet its need within the required time. We have held that a sole-source award can be justified on the grounds that time is of the essence and only the known source can meet the required timeframe, provided that the agency demonstrates that these circumstances do in fact exist. McDonnell Douglas Corporation, B-202904, August 18, 1981, 81-2 CPD 154.

Here, the Navy has provided us with a detailed breakdown of where each of the 39 CBFS's was needed. It argues that if these units are not delivered within the timeframe of the sole-source award, this circumstance will "adversely impact on vital national defense programs." For example, "Trident submarines will be prevented from deploying," support for the "Global Positioning Satellite" program will not be provided as required, training in proper operation of equipment will be delayed, and submarine construction and overhaul schedules will also be delayed.

In explaining why qualification of FEI's product in 1981 would have resulted in unacceptable delay, the Navy states that FEI's offer of providing extra units as a means of speeding up the testing process would not have been materially helpful since, regardless of the number of units available for the reliability test, each unit had to meet the minimum test time of 3 calendar months, or 2,500 test hours, "which does not include repair and rental time";

moreover, an additional 30 days would have been required for a "maintainability demonstration." Also, the Navy insists that in addition to this test time, additional "administrative lead time [would have been] required to generate test procedure and FEI would have [had] to fabricate and deliver the required units with spare parts and documentation to support the tests."

The Navy also insists that the Air Force testing of FEI's similar model to an "airborne" specification--MIL-E-5400--cannot be considered to be an acceptable substitute for the testing to the Navy's "shipboard-use" specification--MIL-F-28811(EC); moreover, the Navy states that the "Air Force has experienced reliability problems with FEI's equipment" and that the "Air Force is attempting to resolve these deficiencies."

Finally, FEI alleges that the Navy's initial protest report indicated that HPC's equipment had not been fully tested until July 1979, even though the equipment had been used since 1975. However, in its supplemental protest report, the Navy maintains that it never meant to imply that HPC's equipment was used before it was fully tested to MIL-F-28811(EC). According to the Navy, first article testing to the specification on HPC's equipment was completed in April 1975 and the most recent follow-on testing on HPC's equipment was conducted in July 1979. In view of this explanation, we see no need to consider this issue further.

In view of the foregoing, we cannot question the Navy's justification for its sole-source award to HPC on the grounds that time was of the essence and only one known source--HPC--could meet its needs within the required timeframe. McDonnell Douglas Corporation, supra. Specifically, we cannot question the Navy's position that delivery "schedule constraints for critical near-term CBFS units prevented the Navy"--given the projected time and uncertainties involved in fabricating and in testing FEI's product--from accepting FEI's January 1981 qualification test offer.

Nevertheless, we note that the Navy plans to implement a competitive procurement schedule in the near future which will provide adequate time for testing.

We also note that another firm has expressed an interest in participating in any future procurement. Therefore, the Navy should ensure, as much as practical, that all potential sources of CBFS's are notified of the upcoming procurement and are given an opportunity to have their equipment tested if they wish.

Protest denied.

Milton J. Aowla
for Comptroller General
of the United States